

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



ORIGINAL

and proof of service

74-2238

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

Appellee,

-against-

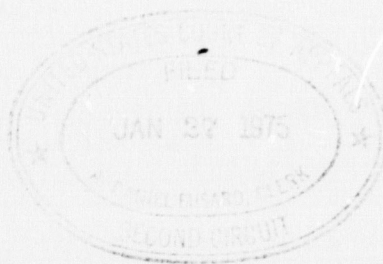
MELVIN KEARNEY,

Appellant.  
-----X

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:  
:  
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*P 215*  
Docket No. 74 - 2238

APPELLANT'S APPENDIX



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PAGINATION AS IN ORIGINAL COPY

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INDICTMENT 74 CR. 242

Filed 3/21

:ml

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA

- v -

MELVIN K. KEARNEY and  
GWENDOLYN MARIE FERGUSON,

Defendants.  
----- x

INDICTMENT

74 Cr. 242

COUNT ONE

The Grand Jury charges:

On or about the 16th day of March, 1972, in the Southern District of New York, MELVIN K. KEARNEY and GWENDOLYN MARIE FERGUSON, the defendants, unlawfully, wilfully and knowingly, by force, violence and intimidation did take and attempt to take from the persons and presence of others, money and property in the approximate amount of \$175,000 which was then in the care, custody, control, management and possession of the Bankers Trust Company, 2104 Crotona Parkway, Bronx, New York which was then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 16th day of March, 1972, in the Southern District of New York, MELVIN K. KEARNEY and GWENDOLYN MARIE FERGUSON, the defendants, unlawfully, wilfully and knowingly, in committing and attempting to commit the offense set forth in Count One herein, did assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices to wit, firearms.

(Title 18, United States Code, Section 2113(d).)

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FOREMAN

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PAUL J. CURRAN  
United States Attorney

(Title 18, United States Code, Sections 2113(a) and (d).)

DOCKET SHEET

D. C. Form No. 100  
CRIMINAL DOCKET

JUDGE MOTLEY

74 CRIM. 242

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Henry Putzel, III-AUSA
MELVIN K. KEARNEY	264-6468
GWENDOLYN MARIE FERGUSON	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
101) Fine,					
Clerk, J.S. #1					
Marshal,					
Attorney,					
X 18					
X 2113(a), (d)					
Robbery of insured bank					
by force & violence. (Ct. 1)					
Assault w/ deadly weapon dur.					
comm. of bank robbery. (Ct. 2)			(Two Counts)		

DATE	PROCEEDINGS
-12-74	Filed indictment. Referred to Judge Motley as a related matter (73Cr1039) B/W's ordered as to both defts. Pollack, J.
25-74	Case reassigned to Judge Bauman. Motley, J.
4-1-74	MELVIN K. KEARNEY - Deft. (Atty Present) PLEADS NOT GUILTY. 30 days for motions. Bail set in the sum of \$100,000. cash or surety. Any sum furnished towards satisfaction of bail on defts. State Court Indictment may be applied to the satisfaction of bail on this indictment. BAUMAN, J.
4-74	Filed CJA Form # 20; appointment of Jesse Berman, 351 B'Way., NYC. 431-4600. BAUMAN, J.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
6-11-74	MELVIN K. KEARNEY - Filed defts. pre-trial motions, for B/P etc.		
4-22-74	Filed CJA Form 21; authorization and voucher for investigator.		
5-17-74	Filed Govt's. affdvt. in response to defts. pre trial motion.		
5-17-74	Filed MEMO END on pre trial motion. Motion disposed of as reflected in minutes. So Ordered. BAUMAN, J.		
6-17-74	MELVIN K. KEARNEY - Atty. present, trial begun with jury		
6-18-74	Trial cont'd.		
6-19-74	Trial cont'd.		
6-20-74	Trial cont'd. & concluded - Jury unable to agree upon a verdict declared by the Court.....Motley, J.	- MISTRIAL	
6-21-74	M.K. KEARNEY - Filed Govt's request to charge.		
6-21-74	M.K. KEARNEY - Filed Govt's memorandum of law.		
6-21-74	***** Filed deft's request on voir dire		
6-21-74	***** Filed deft's trial memorandum		
6-21-74	***** Filed deft's request to charge		
7-18-74	Filed transcript of record of proceedings, dated JUN-6-74 (Filed IN 73 CR 1039)		
7-17-74	M. KEARNEY Filed transcript of record of proceedings, dated June 17, 18, 1974		
7-17-74	M. KEARNEY Filed transcript of record of proceedings, dated June 18, 19, 20-74		
7-18-74	M. KEARNEY - Mailed orig. CJA 1 to A.O. for payment.....Motley, J.		
7-26-74	M.K. KEARNEY - Filed transcript of record of proceeding dated May 17-74.		
7-26-74	M. KEARNEY - Filed affdvt. of Jeffrey I. Glekel, AUSA in support of a writ.		

- See PAGE 3 -



COURT'S CHARGE TO JURY  
(Pages 294-322)

1  
2 either counsel.

3 THE COURT: If that creates a problem in  
4 your mind. It doesn't in mine. I think jurors should  
5 be advised that lawyers are doing their best for their  
6 clients and they should not hold anything against the  
7 lawyer for his aggressive defense but we will omit it.

8 Bring in the jury.

9 (Jury present.)

10 THE COURT: Ladies and gentlemen, first of  
11 all I want to thank you for your patience and the  
12 careful attention you have given throughout this trial.  
13 Now I trust you will bear with me as I instruct you as  
14 to the legal principles which you are to apply to the  
15 facts in this case as you find them.

16 First of all, as you approach the performance  
17 of your function in this case which is to determine  
18 the guilt or innocence of this defendant, please  
19 remember that it's your duty to weight the evidence  
20 calmly and dispassionately without sympathy or  
21 prejudice for or against either the government or the  
22 defendant. Every defendant appearing before this  
23 Court is entitled to a fair and impartial trial  
24 regardless of his occupation or station in life.

25 The fact that the government is a party here,

1           RKpa  
2           that the prosecution is brought in the name of the  
3           United States of America, entitles it to no greater  
4           consideration than that accorded to any other litigant  
5           in the lawsuit.

6                     By the same token, it's entitled to no  
7           less consideration and that is because, as you know, all  
8           parties, government and individuals alike stand equal  
9           before the law.

10                    In this case, the defendant has been charged  
11          with two separate crimes arising out of a single bank  
12          robbery and sometimes we refer to these charges as  
13          counts in the indictment. That is simply another word  
14          for charge. So, I will use those words interchangeably,  
15          but a charge and a count is the same thing.

16                    With respect to each one of those charges  
17          or counts, you must return a separate verdict as to each  
18          count separately, and because this is a trial in a  
19          Federal Court, the verdict of the jury as to each  
20          count must be unanimous and must reflect the  
21          conscientious conviction on each and every one of them.

22                    You are the sole and exclusive judges of the  
23          facts in this case, you as the jurors pass upon the  
24          weight of the evidence and you determine the credibility  
25          of the witnesses who testified right here before you and  
you       resolve such conflicts as there may be in the

1 testimony and you draw such reasonable inferences as  
2 may be warranted by the testimony and the other  
3 evidence in the case.  
4

5 Again, with respect to any matter of  
6 fact, it's your recollection and your recollection  
7 alone which governs. Anything which counsel for the  
8 government may have said or anything which counsel for  
9 the defendant may have said or anything which I may have  
10 said or will say in these charges is not to be  
11 substituted by you for your own recollection of the  
12 evidence or the facts in the case.

13 With respect to the testimony in the case,  
14 I want to remind you that you have to consider all of  
15 the testimony, both direct examination and cross  
16 examination.

17 It's my function to instruct you as to the  
18 law and you should accept the law as I state it to you  
19 in these instructions and apply it to the facts as you  
20 find them.

21 Now, the logical result of that is a  
22 verdict in the case, which again, you must return  
23 separately as to each count.

24 I want to caution you that you are not to  
25 single out any one instruction alone as stating the law;

that you must consider these instructions as a whole.

The fact that I have granted motions or denied motions during the course of the trial is not to be taken by you as an indication that the defendant is believed by the Court to be guilty or not guilty or the charges made against him are true or false. Now, my rulings on these motions and objections as I told you before had to do with questions of law and they had nothing to do with your function of determining the guilt or innocence of this defendant.

If during the course of the trial a question was asked and an objection interposed and I sustained the objection, you are to disregard the question and any alleged facts contained in that question. Similarly, if I ruled that an answer be stricken from the record, you are to disregard both the question and the answer.

As you well know, the reason we are here is that the defendant has entered a plea of not guilty to each charge made against him in the indictment and as I have told you repeatedly now, if the defendant is to be convicted on any charge, the government has the burden of proving to you that he is guilty of the charge beyond a reasonable doubt. That is a burden which never shifts.

1  
2 I want to remind you again, as I told you  
3 earlier, a defendant in a criminal case does not  
4 have to prove his innocence. He does not have  
5 to call any witnesses. He does not have to produce any  
6 evidence. The burden is on the government. He can  
7 sit there and say nothing. He does not even have to  
8 cross examine witnesses.

9 Again, this is because in our system a  
10 defendant is presumed innocent of a charge made  
11 against him in an indictment. Now, this presumption of  
12 innocence was in his favor when the trial started and  
13 remained in his favor throughout the trial and remains  
14 in his favor even as I instruct you now. It remains  
15 in his favor even when you retire to the jury room  
16 to deliberate.

17 The presumption of innocence is removed only  
18 if and when after your deliberations in the jury room  
19 you are convinced that the government has sustained its  
20 burden of proof, and that is to prove the defendant  
21 guilty beyond a reasonable doubt.

22 Now, the question which naturally comes  
23 up, what is a reasonable doubt? The words almost define  
24 themselves. Reasonable doubt is a doubt founded in  
25 reason and arising out of the evidence in the case or lack

1           RKpa  
2           of evidence. It's a doubt which a reasonable person  
3           has after carefully weighing all the evidence. The  
4           kind of doubt which would make one hesitant to act.

5                     Reasonable doubt means a doubt substantial  
6           and not merely shadowy. Reasonable doubt is one which  
7           appeals to your reason and your judgment and your  
8           common sense and your experiences in life. It's not  
9           caprice, whim or speculation. It's not an excuse to  
10          avoid the performance of an unpleasant duty. It's not  
11          sympathy for a defendant.

12                    If after a fair and impartial consideration  
13          of all the evidence you can candidly and honestly say  
14          that you are not satisfied with the guilt of this  
15          defendant and that you do not have an abiding conviction  
16          as to this defendant's guilt, such a conviction  
17          as you would be willing to act upon unhesitatingly in  
18          the important and weighty affairs in your own  
19          personal life, then you have a reasonable doubt and in  
20          that circumstance, it's your duty to acquit the defendant  
21          of the particular charge which you are then considering.

22                    On the other hand, if after such a fair and  
23          impartial consideration of all the evidence you can  
24          candidly and honestly say that you are satisfied of the  
25          guilt of this defendant, that you do have an abiding

1 conviction as to this defendant's guilt, such a  
2 conviction as you would be willing to act upon unhesitating  
3 in the personal affairs of your own life, then you have  
4 no reasonable doubt and in that circumstance, you  
5 may convict the defendant.  
6

7 A reasonable doubt does not mean a positive  
8 certainty beyond all possible doubt, because it's  
9 practically impossible for a person to be  
10 absolutely and completely convinced of any controverted  
11 fact which by its nature is not susceptible to  
12 mathematical certainty. In consequence, the law in a  
13 criminal case is, that it's sufficient if the guilt of  
14 a defendant is established beyond a reasonable doubt, not  
15 beyond all possible doubt.  
16

17 Now, as I told you before, you as  
18 jurors are the sole judges of the credibility or  
19 believability of the witnesses who testified here.  
20 You are also the sole judges of the weight to be  
21 accorded their testimony. You know, of course, that there  
22 is no automatic way to determine who is telling the  
23 truth and who is not telling the truth. Credibility,  
24 as I have indicated, can be equated with believability  
25 and reliability. If a witness is credible, we say he is  
believable and reliable. If he is incredible, we say

1 he is unbelievable. There is nothing mysterious  
2 about these words.  
3

4 Now, by what yardstick are you to judge the  
5 credibility or the believability of the witnesses who  
6 testify here, and this applies to all witnesses.

7 Each of you has given careful attention to  
8 the witnesses as they testify right here before you.  
9 You observe the witnesses. Issues of fact are  
10 presented for your determination and to a large extent,  
11 the resolution of them depends upon the credibility  
12 or the believability of the witnesses and the support  
13 or lack of support that their testimony received from  
14 other evidence in the case.

15 Now, your duty is to decide the issues of  
16 fact and in doing so, you use your logic, your reason and  
17 your common sense and don't be distracted or side-tracked  
18 or diverted by what you consider to be a minor or  
19 insignificant detail or irrelevancy, or by what you  
20 consider to be an appeal not to your reason or logic but  
21 to mere sentimentality or unthinking passion.

22 I repeat, use your common sense. You  
23 should carefully scrutinize all the testimony given, both  
24 direct and cross examination, the circumstances under  
25 which each witness has testified and every matter in

evidence which tends to show where the witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the witness stand.

Consider the witness' ability to observe the matters as to which he or she has testified, and consider whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation a witness may bear to either side of the case; the manner in which each witness may be affected by the verdict; the extent to which if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or within the testimony of different witnesses may or may not cause a jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy in the testimony of any witness, always consider whether it pertains to a matter of importance or an unimportant

1  
2 detail and whether the discrepancy is from  
3 innocent error or intentional falsehood.

4 Now after making your own judgment, you  
5 will give the testimony of each witness such  
6 credibility if any that you think it deserves. If  
7 you find any witness has wilfully testified falsely as  
8 to any material matter, you may reject the entire  
9 testimony of that witness or you may accept such  
10 part or portion as commends itself to your belief or  
11 which you may find corroborated by other evidence in  
12 the case.

13 You should not be influenced by the number  
14 of witnesses a side has called or the number of  
15 documents received in evidence because it's the  
16 quality of the testimony and other evidence which  
17 counts, not the quantity.

18 You are not obliged to accept testimony  
19 even though the testimony is not impeached. You may  
20 decide because of the witness' bearing and misdemeanor  
21 or because of the inherent improbability of his  
22 testimony or for other reasons sufficient to you  
23 that such testimony is not worthy of belief.

24 The Constitution and the laws of the  
25

1 United States provide that in any criminal matters, as  
2 I have told you before, the defendant is under no  
3 obligation to testify or indeed come forward with any  
4 evidence. The burden of proving a violation of  
5 law is solely and exclusively on the government.  
6 I therefore charge you that you may not consider in any  
7 way the fact that the defendant here, Mr. Kearney, has  
8 chosen not to testify in this case. This is his right  
9 under the law and you are not permitted to speculate  
10 on the reasons why he didnot testify, nor may you draw  
11 any inferences of any kind from his decision not to  
12 take the stand. His decision is a choice shared by  
13 every defendant in every criminal trial in this  
14 country. It may in no way be used against him as  
15 a substitute for, or as a supplement to the evidence  
16 before you.  
17

18 Now as you are well aware, the  
19 identity of Mr. Kearney as a participant in the bank  
20 robbery is in dispute in this case. The government in  
21 carrying its burden or attempting to carry its burden  
22 points to two major items of evidence to show that  
23 the defendant participated in the crimes charged in the  
24 indictment. Those two pieces of evidence are first  
25 the fingerprint and palmprints taken at the bank and

1 RKpa  
2 second, the photographs taken of the persons committing  
3 the robbery while the robbery was in progress at the  
4 bank.

5 With respect to the fingerprint and palmprint  
6 evidence, you will recall that the government called  
7 expert witnesses to testify and to give you their  
8 opinions as to the value and significance of various  
9 fingerprints and palmprints obtained at the bank.

10 They testified, as you know, that these palmprints were  
11 compared by them with known fingerprints and palmprints  
12 of Mr. Kearney and they gave you their opinion as to  
13 whether any of the prints found in the bank  
14 matched Mr. Kearney's prints.

15 I want to tell you how you weigh the  
16 testimony of expert witnesses because we have had  
17 a number of expert witnesses here. We also had two  
18 experts with respect to Government's Exhibit 15, I  
19 believe it is, the photograph with the transparency.

20 When a case involves a matter of science  
21 or art or some field requiring special knowledge  
22 or skill, not ordinarily possessed by the average  
23 person, an expert is permitted to state his opinion for  
24 the guidance of the Court and the jury or whoever  
25

has to decide the fact. When an expert is called, he

1 states what his qualifications are in the particular  
2 field. An opinion stated by an expert is based upon  
3 facts which the expert himself observed then testified  
4 about. Sometimes an expert is asked to assume certain  
5 facts in evidence and give an opinion on those facts.  
6

7 What we had in this case were two experts  
8 who observed certain evidence which was presented  
9 to them and they gave you their opinion as to that  
10 evidence. They also testified how they arrived at  
11 their conclusion.

12 You are not required to accept the opinion  
13 of an expert. You may reject an expert's opinion if you  
14 find the facts to be different from those which  
15 formed the basis for the opinion. You may also reject  
16 his opinion if after all the consideration of the evidence  
17 in the case, expert and other, you disagree with his  
18 opinion.

19 In other words, you are not required to  
20 accept an expert's opinion to the exclusion of facts  
21 and circumstances disclosed by other testimony. Expert  
22 opinion is subject to the same rules concerning  
23 reliability and credibility as with the testimony of  
24 other witnesses as I have just explained to you.  
25

1 RKpa  
2 An expert's opinion is given to assist you in reaching  
3 a proper conclusion and is entitled to such weight as  
4 you find the expert's qualifications warrant and must be  
5 considered by you but is not controlling upon your  
6 judgment.

7 Now, with respect to the second source of  
8 evidence which the government relies on to prove that  
9 the defendant was a participant in the crimes  
10 charged in the indictment, that is, the photographic  
11 evidence taken during the bank robbery; the government  
12 has submitted an exhibit which both lawyers have talked  
13 about during their summations and this exhibit, as I  
14 indicated, is, I believe, 15, and shows a picture taken  
15 in the bank during the course of the robbery and it also  
16 shows a known picture of the defendant and then a  
17 transparency of the picture taken in the bank which  
18 has been placed over the known photograph of the defendant.  
19 As you will recall, there were two experts called, one  
20 by the government and one by the defendant who  
21 testified about that exhibit and to give you their views  
22 as to the effect of the transparency and again you are  
23 to weigh the testimony of those experts in the manner  
24 that I have indicated.

25 I would like to remind you and emphasize,

1 before you could find the defendant guilty of any of  
2 the crimes charged, you must be convinced beyond a  
3 reasonable doubt that the defendant participated in the  
4 crime. In this connection, in considering the  
5 photographic evidence, the Court reminds you that  
6 identifying an individual from photographs is  
7 extremely difficult and a task highly subjected to error.  
8

9 Now, with respect to evidence generally, I  
10 would like to point out there are two classes of  
11 evidence recognized and accepted in Courts of Justice  
12 upon which you may find an accused guilty or not  
13 guilty. One is called direct evidence and the  
14 other is called circumstantial evidence. Direct  
15 evidence tends to show the fact in issue without need  
16 for any other amplification, although, of course, there  
17 is always the question whether that evidence is to be  
18 believed.

19 Circumstantial evidence on the other hand  
20 tends to show other facts from which the fact in  
21 dispute may reasonably be inferred. It's that  
22 evidence which tends to prove a fact in issue by proof  
23 of other facts which have a legitimate tendency to lead  
24 the mind to infer that the facts sought to be proved are  
25 true. Therefore, it's not necessary that the

1 participation of a defendant be shown by direct evidence,  
2 but the connection may be inferred from such facts and  
3 circumstances in evidence as legitimately tend to  
4 sustain that inference.  
5

6 Now we come to the indictment inside and I  
7 am going to read the indictment to you, then I am going  
8 to explain as to each charge those elements which you  
9 must find that the government has established beyond  
10 a reasonable doubt before you can find the defendant  
11 guilty. Before doing so, I want to remind you of  
12 something I told you when the trial began, and that is,  
13 that an indictment is not proof or evidence. It's  
14 merely a piece of paper which contains an accusation or  
15 charges and this is the method or technique which  
16 we have employed in our system whereby a Grand Jury  
17 is convened and hears certain evidence and a person is  
18 then accused of a crime.

19 Being accused of a crime does not mean you  
20 are guilty of it and it's then that you are brought into  
21 Court where your guilt or innocence of the charge is  
22 determined by a trial jury or a petit jury such as  
23 you are.

24 The indictment which I am going to read is  
25 not proof or evidence. The proof or evidence is what

1 RKpa  
2 I have explained to you many times now and is the testimony  
3 you have heard, the exhibits and the stipulations.

4 The indictment in this case charges the  
5 defendant with the commission of two crimes, both of  
6 which derive from the robbery of the Bankers Trust  
7 Company at 2104 Crotona Parkway in the Bronx on  
8 March 16, 1972. While it's true that only one bank  
9 robbery occurred, the government is permitted to charge  
10 two crimes arising out of that bank robbery.

11 The crimes charged against this defendant in capsule form  
12 are the following:

13 In the first count, he is charged with the  
14 crime of bank robbery. That is, the use of force,  
15 violence or intimidation to take money from a person  
16 or to take money from the custody of the bank.

17 The second charge charges an assault or  
18 putting in jeopardy the lives of any persons or the  
19 life of any person during the commission of a bank  
20 robbery. That is a separate and distinct crime.

21 The first charge of the indictment reads  
22 as follows:

23 The Grand Jury charges on or about the 16th  
24 day of March, 1972 in the Southern District of New York,  
25 Melvin Kearney and another, unlawfully, wilfully and

1 knowingly by force, violence and intimidation did take  
2 and attempt to take from the persons and presence of  
3 others money and property in the approximate amount  
4 of \$175,000 which was then in the care, custody,  
5 control, management and possession of the Bankers Trust  
6 Company, 2104 Crotona Parkway, Bronx, New York, which was  
7 then insured by the Federal Deposit Insurance Corporation.  
8

9 The indictment cites as the law violated  
10 here, title 18, United States Code Section 2113-A and  
11 title 18 United States Code Section 2.

12 The first law, section 2113-A provides in  
13 pertinent part as follows: Whoever by force and  
14 violence or, by intimidation or attempts to take from  
15 the person or presence of another any property or money  
16 or anything of value belonging to or in the care,  
17 custody, control, management or possession of any  
18 bank, is guilty of a crime.

19 As I have indicated, there is another  
20 person named in the indictment and the evidence  
21 disclosed that there were other persons involved in  
22 the commission of the crime but the other defendant  
23 named and those other persons are not on trial before  
24 you. The only person on trial here is Melvin Kearney,  
25 and you are not permitted to speculate during the course

1 RKpa  
2 of your deliberations as to why those other persons are  
3 not on trial.

4 Now, the other statute which is cited in  
5 connection with count one is the aiding and abetting  
6 statute which is title 18 United States Code,  
7 section 2, and that statute provides in pertinent part  
8 as follows: Whoever commits an offense against the  
9 United States or aids, abetts, counsels, commands,  
10 induces or procures its commission is punishable as a  
11 principal.

12 Now, coming to the elements of count one,  
13 the bank robbery charge, in order to find the defendant  
14 guilty of this charge, you must find that the government  
15 has established beyond a reasonable doubt each of  
16 the five following elements of that crime. First, that  
17 on or about March 16, 1972, the Bankers Trust Company  
18 at 2104 Crotona Parkway, Bronx, New York, was a bank,  
19 the deposits of which were insured by the Federal  
20 Deposit Insurance Corporation.

21 Second, that on or about March 16, 1972,  
22 the defendant took money from the bank which belonged  
23 to or was in the care, custody, control, management or  
24 possession of that bank.

25 Third, that the money was taken from the  
person or presence of one or more of the defendants; that

the defendant accomplished this taking by force and violence or intimidation.

Fifth, the defendant acted knowingly and wilfully.

With respect to the first three elements which I have just enumerated, they seem simple enough and we do not need any further explanation as to those.

With regard to the very first element, you will recall that the parties here have stipulated that the Bankers Trust Company's deposits were insured by the Federal Deposit Insurance Corporation. This is one of the elements of the crime that must be established.

The fourth element does need some explanation. You recall the fourth element, that is, that the taking the money must be accomplished by an act of force or violence or by intimidation.

With respect to that fourth element, the government is not required to show that force and violence were actually used against anyone. If they prove beyond a reasonable doubt that the taking was a result of intimidation, that is, a result of placing another person or persons in fear.

Intimidation may be established by proof of circumstances that are normally and reasonably

1 RKpa  
2 calculated to arouse fear in the ordinary run of human  
3 beings.

4 So, if it happened that some extraordinarily  
5 timid person was put in fear by some sort of words or  
6 actions that would not normally frighten anyone, this  
7 would not be the kind of intimidation with which the  
8 statute is concerned.

9 On the other hand, if the proof shows  
10 conduct by a defendant which would normally be  
11 expected to generate fear, then it's not necessary that  
12 those affected should actually have experienced some  
13 terror or panic or hysteria.

14 The question in short in this respect is  
15 an objective one. It's whether the government has  
16 sustained its burden of showing conduct of the  
17 accused which was of such a nature as to be a sensible  
18 and reasonable basis for the generation of fear.

19 As to the final and fifth element of the  
20 crime charged in count one, that the defendant acted  
21 knowingly and wilfully, and I will explain in a few  
22 moments what we mean by knowingly and wilfully.

23 Now we come to the second count in the  
24 indictment which I shall read to you:

25 The Grand Jury further charges on or

1 about the 16th day of March, 1972 in the Southern  
2 District of New York, Melvin K. Kearney and Gwendolyn  
3 Marie Ferguson, the defendants, unlawfully, wilfully  
4 and knowingly in committing and attempting to commit the  
5 offense set forth in count one herein, did assault  
6 and put in jeopardy the lives of persons by the use  
7 of dangerous weapons and devices, to wit, firearms, and  
8 in this connection, the Grand Jury's indictment cites  
9 Title 18 United States Code Section 213-D.  
10

11 As I told you, that statute makes it a  
12 separate and distinct crime to commit the offense  
13 charged in count one, that is, bank robbery and  
14 in connection therewith, to assault any person or put  
15 the life or lives of any persons in jeopardy by the  
16 use of a dangerous weapon or device such as a firearm.  
17

18 In order to find the defendant guilty of  
19 count two, you must find the defendant committed the  
20 bank robbery, that is, the crime charged in  
21 count one as I have explained it to you.

22 In addition, you must find beyond a  
23 reasonable doubt that defendant in committing the  
24 bank robbery assaulted one or more persons or, by the  
25 use of a dangerous weapon or weapons, that is firearms,  
put in jeopardy the life or lives of one or more persons.

1  
2 Again, count two requires a finding either that there  
3 was an assault or that the lives of one or more  
4 persons were placed in jeopardy by the use of a dangerous  
5 weapon. It's not essential to find both an assault  
6 and an endangering of lives by the use of such weapons.  
7

8 In considering this, you will take into  
9 account and keep in mind and undertake to  
10 remember an applied legal definition of the word  
11 assault. That word is defined to refer to an unlawful  
12 attempt or threat to apply force and violence to  
13 inflict bodily harm when the attempt or threat is  
14 coupled with an apparent presentability to carry  
15 it out. That is, to arouse fear in the intended threatened  
16 victim so he would be subject to immediate physical  
17 injury.

18 An assault, as it's defined in law may be  
19 committed without actually touching or striking or  
20 doing bodily harm to the person in question. For  
21 example, the flourishing or pointing of a pistol or gun  
22 at another person for the purpose of putting that person  
23 in fear, is sufficient to constitute an assault.

24 If you find no assault in connection with  
25 count two, this count may be satisfied, as I have said,  
or established, as I have said, if you find that the

1 life of at least one person was put in jeopardy by the  
2 use of a dangerous weapon. To justify such a finding  
3 in this case, you must be convinced beyond a reasonable  
4 doubt that the accused carried one or more firearms which  
5 were drawn and loaded. It's not essential to such a  
6 finding that there be directed evidence that shows that  
7 the firearm was in fact loaded. If a person is engaged  
8 in a robbery and displays or points a gun to insure his  
9 demand and attempts to produce fear in a person  
10 or persons, the jury is permitted to infer from such  
11 fact that the gun was loaded and capable of inflicting  
12 the deadly injury threatened by the one who employed it.  
13 In other words, to convict this defendant on any count,  
14 you must find beyond a reasonable doubt that the  
15 defendant's alleged offense was committed unlawfully,  
16 wilfully and knowingly.

18 I told you a minute ago I would explain  
19 those terms to you in a few minutes, but that finding  
20 must be made also as to count two. That is, as to  
21 each count you must find the defendant acted unlawfully,  
22 knowingly and wilfully.

23 Before defining those terms for you, I  
24 want to go back to the aiding and abetting statute which  
25 you recall I read in connection with count one. That is,

the pertinent part of that aiding and abetting statute.

In the light of that statute, it's not necessary for the government to show that defendant Kearney physically took money from the bank, for example, or actually used force or violence or intimidation or actually assaulted someone or put someone's life in jeopardy himself.

However, it is the government's position that in this case it was Kearney who physically seized and removed some of the money from the bank.

As to the other elements, force or violence or intimidation, assault, putting lives in jeopardy, as to these elements it appears that the government's theory is that the defendant Kearney aided and abetted the commission of these particular aspects of these crimes. Consequently, it's enough for the conviction of the defendant on either count or on both counts to find that with respect to each count that he knowingly aided and abetted these particular elements.

In order to find the defendant guilty as an aider and abettor, you must find that the defendant knew the essential nature of the scheme in which he was involved. You must further find that he participated in this as something he wished to bring about,

and that he sought in some way by his actions to make it succeed. One who aids and abetts another in the commission of a crime is actually guilty as the person who actually commits the crime.

Therefore, if you find beyond a reasonable doubt with respect to the first count in this indictment that the defendant committed the robbery charged or aided and abetted others in its commission, you may find the defendant guilty of that particular count and with respect to the second count, if you find beyond a reasonable doubt that a bank robbery was committed as defined in count one and if you find beyond a reasonable doubt as charged in count two during the commission of the bank robbery the persons involved assaulted or put in jeopardy the life or lives of any person or persons by the use of a dangerous weapon, and if you find beyond a reasonable doubt that the defendant aided and abetted others in the commission of the assault or the jeopardizing of lives, you may find the defendant guilty of count two.

With respect to the definition of unlawfully, wilfully and knowingly. Of course you know lawfully, unlawfully means contrary to law. An act is done knowingly if it's done voluntarily, purposely and not

1 RKpa  
2 because of mistake, accident, mere negligence or other  
3 innocent reason . An act is done wilfully if it's done  
4 knowingly, deliberately, intentionally and with an  
5 evil motive or purpose. In determining whether a  
6 defendant has acted wilfully, it's not necessary for  
7 the government to prove that the defendant knew that he  
8 was making any particular law or any particular rule,  
9 but it must show a bad purpose or motive on the part  
10 of the defendant.

11 If you find that the government has failed  
12 to establish any one of the essential elements of the  
13 crimes charged as I have just enumerated them for you  
14 and discussed them for you in detail, you must acquit  
15 the defendant on that charge.

16 If, on the other hand, you find that the  
17 government has established each and every one of the  
18 elements of the crime charged beyond a reasonable  
19 doubt, you may find the defendant guilty.

20 The jury is not to consider or in any way  
21 to speculate about the punishment that a defendant may  
22 receive if he is found guilty. In other words, during  
23 the course of your deliberations, you are not to discuss  
24 any possible punishment; the function of a jury is to  
25 determine the facts and return a verdict of guilty or

1 not guilty. Then it's for the Court alone or the Judge  
2 to determine what the sentence will be if there is a  
3 conviction.  
4

5 So, you are not to discuss during your deliber-  
6 ations any possible penalty.

7 Now, ladies and gentlemen, the most  
8 important part of this case is the part which you are now  
9 about to play because it's for you and you alone to  
10 determine whether this defendant is guilty or not  
11 guilty. I know that you will try the issues as they  
12 have been presented to you according to your oath which  
13 you took as jurors and in that oath you promised that  
14 you would well and truly try the issues joined in this  
15 case and a true verdict render. I suggest to you that  
16 if you follow that oath and try the issues without  
17 combining your thinking with any emotion, then you will  
18 arrive at a true and just verdict. It must be clear  
19 to you that once you get into an emotional state and let  
20 fear or prejudice or bias or sympathy interfere with your  
21 thinking, then you will not arrive at a true and just  
22 verdict.  
23

24 As you deliberate, ladies and gentlemen,  
25 please be careful to listen to the opinions of your  
fellow jurors and to ask for an opportunity to express



1           your own views. No one juror holds the center stage in  
2           the jury room and no one juror is permitted to monopolize  
3           the discussion. If after listening to your fellow jurors  
4           and if after stating your own view you become convinced  
5           your view is wrong, do not hesitate because of stubbornness  
6           or pride of opinion to change your view. On the other  
7           hand, do not surrender your conscientious conviction  
8           solely because of the opinion of your fellow jurors or  
9           because you are outnumbered.  
10

11                 Again, as I have said, your verdict as to  
12           a particular count must be unanimous and the form of your  
13           verdict is either guilty or not guilty as to the  
14           particular charge you are considering. When you  
15           retire to the jury room you may send for any  
16           exhibits which you would like to see or have any of  
17           the testimony you desire read back.

18                 You are instructed you are not to reveal  
19           the standing of the jurors, that is, the split of the  
20           vote to anyone for any reason at any time including the  
21           Court.

22                         (At the side bar.)

23                 THE COURT: Any exceptions to the charge  
24           other than those already stated at the first trial?

25                 MR. BERMAN: I take exception to the charge